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Brief of Dembitz for D.C.

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JAMES H. Mc

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

Filed Mar. 25, 1896.
No. 318.

J. J. DOUGLASS, Plaintiff in Error,

VS.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR THE DEFENDANT IN ERROR.

W. S. TAYLOR,
Attorney-General for Kentucky.

LEWIS N. DEMBITZ,
Of Counsel for Defendant in Error.



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May it please the Court:

There has seldom been a writ of error obtained from this court against the judgment of the highest court of a State with as little prospect of or ground for reversal as in the case now before your Honors; but the present law officer of Kentucky, who has come into office but a few short months ago, is not to blame for not having gotten rid of the writ of error by "motion to dismiss or affirm" more than two years ago.

The record is very short. It is true there are seventy-eight pages in the printed record; but of these thirty-seven pages are taken up with the opinion of the Court in which the action was first brought, and from which it went to the Court of Appeals of Kentucky, and most of the remaining matter with formal entries, certificates, citations, etc.

The only material parts of the printed transcript are:

1. The petition of the Commonwealth of Kentucky against the plaintiff in error and others, charging them with unlawfully claiming the franchise of conducting and drawing the Frankfort lottery, on pages of printed transcript, 1, 2, and 3.
2. The answer of J. J. Douglass, the plaintiff in error, on pages 4-12, and the exhibits filed with it, pages 13-26.
3. The opinion of the Court of Appeals of Kentucky, showing the Federal question which is involved.

4. The application for the writ of error, which seeks to state the Federal question in its various phases, pp. 73, 74.

The petition of the Commonwealth, which is in the nature of a writ of *quo warranto*, sets out that by an act of 1869 of the Legislature of Kentucky, entitled, "An act to amend and reduce into one the several acts in relation to the city of Frankfort," a lottery franchise was granted to that city; that by an act approved March 28, 1872, the Board of Councilmen of that city were authorized and empowered "to grant, bargain, sell and convey, to rent or lease, any and all property or any part thereof, belonging to the city of Frankfort, be the same lands, tenements, goods and chattels, or franchises or immunities;" that J. J. Douglass and two others, who are made defendants, derive title under this act from the Board of Councilmen of Frankfort, but that on the 22d of March, 1890, the clause of the act of 1869 granting the lottery franchise was expressly repealed, and that moreover in the new Constitution of Kentucky, coming into force in 1891, it is thus provided: "Lotteries and gift enterprises are forbidden and no privileges shall be granted for such purposes, and no schemes for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges in charters heretofore granted are revoked."

The answer of J. J. Douglass first sets out with more fullness the acts conferring the franchise, then it proceeds to trace title to him from the Council of that city, by a contract which requires the grantees, during the term of fifty-one years (i. e., 1876-1926) to pay certain sums therein named to that city for the benefit of its public schools. He then recites an act of May 17, 1886, which authorizes every corporation or person which has been found by the judgment of the Court of Appeals to have a lawful and subsisting lottery privilege, to conduct such lottery upon giving bond in a named penalty, and on paying certain license taxes; and a section in the Louisville tax law of 1884 directing that city to collect certain license taxes on lottery shops. He shows that the franchise claimed by him has been sustained as lawful and subsisting by a decision of the Court of Appeals rendered in 1878. The rest of the answer consists in setting up the further retention of the franchise against the repealing act of 1890, and against the revoking clause of the Constitution, as a contract right; claiming as well the benefit of a contract with the State, as the benefit of a contract with the city of Frankfort, neither of which the State can impair. Then follow the exhibits, the first and

most important of which is the contract with the city of Frankfort. This contains among other things the following clause (printed p. 18, original page 35):

"Provided however and it is expressly understood that nothing herein contained shall be construed as a guarantee on the part of the parties of the first part of the validity of the lottery grant herein referred to, or as to their power to dispose of said scheme and classes."

The Louisville Law and Equity Court, in which the *quo warranto* proceeding was first instituted, overruled a demurrer to this answer and the Commonwealth standing by its demurrer, the petition was dismissed, and the writ denied. The Commonwealth appealed, and on the 16th of December, 1893, the Court reversed the judgment of the court below, and remanded the cause "for proceedings in conformity with the opinion herein." The opinion declares that the Commonwealth had the authority to revoke the charter, and that it has been revoked. Whether it was proper to take a writ of error from this judgment of the Court of Appeals without waiting for a decision in the court below upon the mandate may be doubted, but we do not raise the point. We are quite willing to let this Court pass upon the merits as raised by plaintiff in error in his application, which was granted by one of the judges of the Kentucky Court of Appeals.

In fact, the case at bar differs in substance, if not in form, from *Bostwick v. Brinkerhoff*, 106 U. S. 3, the leading case on this point. When the Court of Appeals of New York, in that case held that State courts have jurisdiction of an action of negligence against the directors of National banks, it left it of necessity to the lower court to go on with the inquiry whether the defendants before it were guilty of negligence. But when the Court of Appeals of Kentucky held that the repealing act of 1890 and the revoking clause in the Constitution of 1891 were valid, it left the defendant Douglass nothing to stand upon; for if this was so, neither he nor any one else could be the lawful owner of a lottery franchise in Kentucky. Hence the judgment of reversal was for all practical purpose a final judgment; the order for further proceedings was a mere thing of form.

We have looked into cases later than *Bostwick v. Brinkerhoff*, such as *Johnson v. Keith*, 117 U. S., 199, *Rice v. Sanger*, 144 U. S., 197, *Meagher v. Minnesota Manufacturing Company*, 145 U. S., 608; and in these cases as well as in the first-named, there was a motion to dismiss. We make no such motion here.

We also find *Louisville Gas Company v. Citizens' Gas Light Company*, 117 U. S. 683, where the mandate of the Court of Appeals of Kentucky, from which the writ of error was taken in this court, remanded the cause to the Louisville Chancery Court with instructions to enter a certain final judgment in favor of the appellant, and this court treated the judgment as final, and reversed it upon the merits. Now, as shown above, the mandate of reversal by the Court of Appeals in this case is in substance at least, if not in form, as direct and final as that in the Gas Company's case; it left just as little to be tried.

We firmly believe that the plaintiff in error in this case took the writ of error to this court with the purpose, and in the hope, that it would be dismissed on the point of the lack of finality; that a final determination of his rights would thus be staved off for two or three years more, and he might thus be enabled to carry on his nefarious calling to the injury of the community. Hence we trust, that if this Court can consistently waive this point, so as not to dismiss the cause *sua sponte*, for the lack of a final judgment in the highest Kentucky court, that your Honors will take the cause up on its merits.

But if there must be a dismissal for want of jurisdiction, why not put it upon another ground, which will forever end this controversy? We firmly maintain that there is no Federal question involved. There was a Federal question in the lottery cases from Alabama, Mississippi and Louisiana hereafter referred to, because the grant was made to an individual or to a private corporation. But in this case the grant was contained only in a city charter. It is a familiar principle, laid down by Dillon in his work on Municipal Corporations, and so well known that it would be idle to quote authorities to this Court, that a municipal charter is not a contract; that cities and towns are only sub-divisions of the State government, liable to be changed at any time in the discretion of the Legislature. If the Federal question can be raised in this case, because the State of Kentucky chose to change one section in the charter of the city of Frankfort, a Federal question can be raised in every case of a charter amendment; and as our city charters are continually being changed and overhauled, almost every case growing out of municipal matters will be liable to be brought by writ of error from the highest State court to this court, causing infinite delay in the administration of justice, and clogging the business of this court beyond endurance.

We are fortunate enough to find a case exactly in point; it is *New Orleans v. New Orleans Water Works*, 142 U. S. 79. We quote from the syllabus:

"Before this Court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment, and some ground to believe that it was impaired."

Again:

"A municipal corporation, being a mere agent of the State, stands in a governmental or public character, in no contract relation with the sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation; but such a corporation, in respect to private or proprietary rights and interests, may be entitled to constitutional protection."

This Court (with the dissent of only one of the justices) dismissed the cause for want of jurisdiction, on the ground that the legislative amendment of the city charter did not present a sufficient semblance to changing a contract, to raise the constitutional point.

Mr. Justice Brewer says in his opinion (p. 87):

"The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, *otherwise a Federal question might be set up in almost every case, and the jurisdiction of this Court invoked simply for the purpose of delay.*" He then quotes *Millingar v. Hartuppee*, 6 Wall, 258.

The absurdity of calling a clause in a city charter, which gives to a city one means, among others, for raising revenue a contract; the still greater absurdity of giving this name to a law imposing a license tax, takes this writ of error outside of the requirement, stated by Mr. Justice Brewer, that there must be "some foundation" for the Federal question. But the last prop is taken away by the Kentucky act of February 14, 1856, reserving the right of legislative repeal, which precedes all the legislative acts relied on by the plaintiff in error; and which was enforced by this Court in *Louisville Water Works v. Clark*, 143 U. S. 1, and is again referred to hereafter. This act takes the case at bar clearly beyond the limitation above quoted from the *New Orleans* case, that there must have been "a legal contract subject to impairment."

Your Honors have, therefore, if they prefer to dismiss the writ of error of their own motion rather than to affirm the

judgment below, the best reason to do so upon the ground that no Federal question is involved.

By doing so your Honors will set the whole matter at rest, and save yourselves from being troubled by this controversy again, when final judgment shall have been entered in the lower Kentucky Court under the mandate of the Court of Appeals.

Should your Honors conclude to decide the matter upon its merits, we have the following further arguments to offer, part of which may also be considered on the proposition to dismiss for want of a Federal question.

The important part of the opinion of the Court of Appeals is found at the bottom of page 70 of the printed record, and reads thus:

"The famous Dartmouth College case, and others that have followed it, are invoked to sustain this position. But the Supreme Court of the United States in *Stone v. Mississippi*, 101 U. S., 814, in construing the provisions of the Federal Constitution which declares that the States shall pass no law impairing the obligation of contracts, held that the inhibition related to 'property rights' and not to matters that were 'governmental.' The Court there held in strong and emphatic language that lotteries, being a species of gambling, were vicious and demoralizing to the community, and that as it was the trust and duty of the State government to protect and promote the public health and morals, it could not sell, barter or give away that duty, etc."

The opinion then proceeds on this line, and the point here touched upon is the only one which raises a Federal question which is simply:

Was there a binding contract made by any one, with or in favor of the plaintiff in error, which the Commonwealth of Kentucky "impaired" by the repealing act of 1890, or by the lottery clause of the Constitution of 1891?

First—Was such a contract made by the Commonwealth?

Second—If there was such a contract between the city of Frankfort and the plaintiff in error, or his grantors, did the State action of 1890 and 1891 impair the obligation of this contract?

First—There was not, and could not be, a contract between the Commonwealth and any one, giving him the right of conducting a lottery for a definite or an indefinite time, beyond the power of revocation. There could not be, as held in *Stone*

v. Mississippi, quoted in the opinion cited above; and the decision there rendered was foreshadowed in the preceding case of *Boyd v. Alabama*, 94 U. S., 645, and is affirmed in the subsequent case of *New Orleans v. Houston*, 119 U. S., 265, 274. This is a doctrine from which this Court will never recede.

Moreover, there was not in fact either a contract, or even the appearance of a contract. The franchise was originally granted to a municipal corporation, as a part of its means to raise revenue for the benefit of its public schools. There is no precedent in the decisions of this Court of any city or town charter ever being brought within the rule of the *Dartmouth College* case. Hence, the act of 1869, granting the franchise, did not on its face imply any promise on behalf of the Commonwealth to abstain from repeal for one legislative session, or even for a single day. The act of 1872 authorizes the city of Frankfort, through its council, to sell its franchises. Under it the city can sell no greater rights than it owns.

The acts of 1884 and 1886 imposing a license tax on lottery shops, and a license fee, along with the duty of giving bond on the head office, are as open to repeal as any other tax laws. It would be an insult to this Court to quote authorities on this proposition.

But there is another reason why the acts of 1869 and of 1872 are not contracts, even on their face. On the 14th of February, 1856, the Legislature of Kentucky passed an act to the following effect:

"All charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed; *Provided*, that while privileges or franchises so granted may be changed or repealed, no amendment shall impair other rights, previously vested."

This act was passed upon, and enforced by this Court in the case of the *Louisville Water Co. v. Clark*, 143 U. S., 1, a case certainly much more meritorious on the part of the appellant than the case at bar. (The plaintiff in error does not pretend to act under the act of 1838, but under one passed in 1869, giving like franchises as those which had been granted in 1838.)

Second—The repealing acts of 1890 do not impair any contract made by the city of Frankfort. The contract made by

the city is altogether executed. It conveys whatever franchise it has. It positively refuses to guarantee the validity or extent of the franchise. The city steps out once for all.

The position that the assignee of a franchise stands in a better light than the original grantee is fully met in the Water Company case just cited on page 17; the claim was there made on behalf of the mortgagees of the Water Company, that the repealing act diminishes their security.

The Court of Appeals, in the judgment appealed from, rely entirely on *Stone v. Mississippi*. Their attention was not drawn to the act of February 14, 1856, as it was not necessary to do so.

Otherwise, they would not have needed to excuse their departure from the Kentucky precedent of *Gregory v. Trustees of Shelby College*, 2 Met., 589, in which a lottery franchise was sustained against repeal to the extent to which third parties had advanced money on its faith; for the Shelby College grant had been made long before February 14, 1856.

A reversal of the judgment brought here by writ of error is wholly out of the question. Its affirmance, in preference to the dismissal of the writ, is earnestly requested.

Respectfully submitted,

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